

Constitutional Adjudication of International Law Violations

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On June 9, 2020, the Israeli Supreme Court delivered its long-awaited decision in the case of *Silwad Municipality v. The Knesset*, regarding the [Settlement Regularization Law](#) (the “Settlement Law”), enacted by Knesset in 2017. The Court [invalidated](#) the Law by an 8 to 1 majority, determining that it violated the constitutional rights to property, dignity and equality, protected by Basic Law: Human Dignity and Liberty (the “Basic Law”) one of the [fourteen Basic Laws](#) that, together, comprise Israel’s constitutional framework. In addition to the importance of the concrete decision, the ruling raises important issues regarding the applicability of Israeli constitutional law to the Occupied Territories, the role of international law in the context of constitutional review in Israel, and the relevance of the answers to these issues in the case of a possible upcoming annexation of the West Bank.

The Enactment and Content of the Law

The Law was enacted in 2017, following a political crisis that emerged after the Supreme Court [ordered](#) the evacuation of Amona, a Jewish settlement built on private Palestinian land.

The Law establishes a mechanism for expropriation of usage rights in private Palestinian land on which settlements were built, in exchange for compensation. The mechanism is applied to settlements established in “good faith”, that is, without the settlers knowing that the land was privately owned, or with government assistance, defined broadly.

Generally, Israel [operates](#) in the Occupied Territories under an international law of occupation framework. Under Article 43 of The Hague Regulations, the law that existed in the territory at the time of occupation continues to apply during occupation. In addition to the preexisting law, the Military Commander is authorized to issue orders for the purposes permitted by the law of occupation. The law in the Occupied Territories is thus comprised of two layers: Jordanian law, which is the basic layer, and military orders, which function as legislation. However, the Settlement Law diverts from this framework, as it is a direct act of Knesset legislation that purports to apply, extraterritorially, in the Occupied Territories.

The Settlement Laws’ enactment caused an intense public stir. Notably, the Attorney General refused to defend it in court, stating that in his opinion, it was unconstitutional. In an exceptional move, the state hired a private attorney to represent its position in court.

The Petitions and the Court's Ruling

The petitioners argued that the Settlement Law was invalid on several grounds: first, they argued that the Settlement Law was void since the Knesset has no authority to legislate in the Occupied Territories. In addition, they argued that the Settlement Law violated the law of occupation's prohibition on the expropriation of private property. Finally, they argued that the Settlement Law violated the constitutional rights to property, livelihood, dignity and equality, encompassed in Basic Law: Human Dignity and Liberty.

The state's representatives argued that there was no impediment preventing the Knesset from enacting extraterritorial legislation, and that under the Israeli rules regarding the domestic status of international law, Knesset legislation superseded international law. They further argued that in any case, the Settlement Law did not violate international law nor did it violate Israeli constitutional law.

The majority opinion, written by Chief Justice Hayut, is based predominantly on Israeli constitutional law. Hayut opens by declaring that the Law violates the constitutional guarantees of Israeli law. In light of this conclusion, she explains there is no need to decide on the question of whether the Knesset is authorized to legislate in the Occupied Territories, as well as on the question of whether Basic Law: Human Dignity and Liberty applies to Palestinian residents of the Occupied Territories.

Instead of ruling on the latter question, Hayut chose to anchor the applicability of the Basic Law to the case in the parties' consent regarding such application, and, notably, in the statement that the Knesset itself, when legislating, is bound by the Basic Laws, wherever the enacted laws may apply. This legal construction leads to a peculiar result: while refusing to determine that Israel's Basic Laws apply in the Occupied Territories, the Court effectively ruled that they apply wherever the Knesset laws may take effect.

Hayut concludes that the Settlement Law violates both the right to property, and the rights to dignity and equality. With respect to the latter, she explains that despite the fact that the Law is phrased in neutral terms, it was enacted exclusively for the benefit of Jewish settlers, harms Palestinian residents, and establishes preferential treatment of Jews with respect to illegal building in the Occupied Territories.

Hayut then moves to examine whether the violations fulfill the requirements of article 8 of the Basic Law, referred to as the "limitations clause", which determines that: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required".

Focusing on the questions of whether the Law was enacted for a "proper purpose", and, if a proper purpose could be located, whether it was proportional, Hayut examines two possible purposes: the first is the "systemic" purpose, to retroactively validate illegal building in the Occupied Territories through the taking of private property. The second is the "humane" purpose, which is to alleviate the harm that

would be caused to settlers who have established their homes in good faith, should they be required to evacuate. While the first was not a legitimate purpose, Hayut determined that the second was, arguably, proper, and thus justified moving to the last phase of constitutional review, the question of proportionality. With respect to this question, she concluded that the proportionality test was not met, and that the Settlement Law was thus void.

The minority opinion, written by justice Sohlberg, differs from the majority with respect to the “proper purpose” of the law. Hayut ties together the purpose of the government policy of settlement and the desire to regularize illegal acts, referred to both of these purposes as “systemic”. Focusing on the latter, she refrains from explicitly addressing the legitimacy of Jewish settlements in the Occupied Territories. Sohlberg, in the minority opinion, agrees that the Settlement Law violates the rights to property and equality, but states that the purpose of “establishing and regularizing the settlement in Judea and Samaria” is a proper purpose, and determines that the Settlement Law withstands the limitations clause. Notably, Justice Hendel, in a concurring opinion, also perceives this purpose to be legitimate, although he reaches the opposite conclusion with regard to proportionality.

Understanding the Decision – Between International and Constitutional Law

Within Israel, the common grounds for invalidations of laws have been, to this date, incompatibility of a law with the Basic Laws. Invalidating a law on other grounds is exceptional. Invalidating a law on the grounds of non-authority of the Knesset to legislate it would be considered radical. Thus, despite the fact that Hayut indicates that there are serious issues regarding the authority of the Knesset to enact the Settlement Law, as it is not the sovereign in the Occupied Territories, she chose a tried-and-tested, constitutional route for invalidation, determining that there is no need to decide on the territorial application of the Basic Law in the Occupied Territories, since the Knesset is, in any case, bound by it.

Once the constitutional path has been chosen as the prism through which the validity of the Law is examined, a following question arises: to what extent, if at all, is international law relevant to constitutional review?

Shortly after the establishment of the state of Israel, the Supreme Court determined several rules on the domestic status of international law. According to these rules, customary international law is considered to be part of Israeli law but is superseded by conflicting primary legislation. Treaties are only considered to be part of Israeli law if incorporated into domestic law by Knesset legislation. In addition, the Court has applied a “presumption of compatibility” with international law, according to which domestic law should be interpreted consistently with Israel’s international obligations, when possible. These rules of incorporation have been reinforced and applied in numerous cases throughout the years.

One question that remained open is whether the presumption of compatibility applies not only to legislation, but also to the Basic Laws. This question has risen before,

most notably, in a series of cases concerning laws that ordered the imprisonment of asylum seekers, but [the Court refrained from ruling on it](#). The respondents argued that since primary Knesset legislation supersedes customary international law, once the Knesset enacted legislation that explicitly conflicted with international law, the latter was, effectively, out of the picture. They therefore argued that there was no room to take into consideration international law in the process of constitutional review.

While the majority opinion does not refer explicitly to the applicability of the “presumption of compatibility” to constitutional norms, it states that “there are, in this case, normative sources in international law, which must be addressed in the course of constitutional review”, and which affect the rights of Palestinian residents of the Occupied Territories to property and equality. The Court explains that the status of Palestinian residents of the Occupied Territories as “protected persons”, and the protections accorded to them under the law of occupation, should be taken into consideration when evaluating whether the requirements of the limitation clause are met. These protections lead, for example, to the conclusion that the “systemic” purpose of taking of private land in order to establish the settlements cannot, in these circumstances, be considered a “proper purpose”. Thus, while the decision is rooted in constitutional law, international law is interwoven into it.

An additional interesting point in this regard is Justice Melcer’s comment regarding the relevance of the international agreements between Israel and the Palestinians. International law, explains Melcer, including these agreements, should be taken in consideration in examining the fulfilment of the limitations clause since violation of international agreements is incompatible with the *values* of the state of Israel.

Beyond the Specific Case

In addition to ruling on the specific, contentious issue of retroactively legalizing illegal settlements through violation of Palestinian property rights, the ruling addressed an abundance of general issues, the relevance of which exceeds the specific case. Some of these issues are particularly significant in light of the possible prospect of an upcoming annexation of parts of the West Bank.

First, it is notable that the Court refrained from addressing the authority of the Knesset to legislate in the Occupied Territories. The Court did not rule on the Petitioners’ claim that the act of legislation was void due to the fact that the enactment of legislation in an occupied territory itself violated international law, regardless of the content of such legislation. Since annexation is likely to take place by law, this signals that the Court is unlikely to invalidate such a law on the grounds of lack of authority to enact it under international law. However, the decision also indicates that international law is to be considered in the process of constitutional review. This may be significant since to the extent that an annexation law violates the rights of Palestinian residents, both in annexed and non-annexed territories, international law may be relevant for examining the constitutionality of an annexing law, in whole or in part. Finally, the reliance on the principle of equality, emphasized in Justice Barak-Erez’s concurring opinion, and, in particular,

the Court's examination of the de-facto discriminatory impact of the Settlement Law, signals to the state that laws that have the potential of affecting Jews and Palestinians differently will be closely scrutinized. This is an important message in light of the publications that annexation [may not result in equal rights and status](#) of Jews and Palestinian residents of the Occupied Territories.

